IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-6078

LINDA R.S., ET AL.,

Appellants

V.

RICHARD D. AND TEXAS, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR APPELLEES

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
ALFRED WALKER
Executive Assistant Attorney General
SAMUEL D. MCDANIEL
Staff Legal Assistant
J. C. DAVIS
Assistant Attorney General
PAT BAILEY
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Attorneys for Appellees

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AUTHORITIES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW the Appellees, the State of Texas, Robert Calvert, Chief Justice of the Texas Supreme Court, and Crawford C. Martin, Attorney General of Texas, and file Appellees Brief in response to Appellants' Brief heretofore filed.

STATEMENT OF THE CASE

This action is an appeal by the Appellants, Linda R.S., her minor child, and all other mothers and children of the class they allegedly represent from the judgment entered by the Court below on the 1st day of November, 1971, in a class action commenced by the Appellants against the Appellees, wherein the Appel-

lants sought: (1) a declaratory judgment holding invalid Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, (2) an injunction requiring the State of Texas and its officers to cease certain alleged discriminatory application of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, and (3) an order requiring Richard D., the alleged father of Linda R. S.'s child to pay child support.

The Appellants in this proceeding are women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father.

The Court below, in its judgment entered on the 1st day of November, 1971, held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of the case. As to the remaining portion of Appellants' case, the Court below held that the provisions of Article 4.02 of the Texas Family Code were of such nature as to be improper for consideration by a three-judge federal court and remanded this portion of the proceeding to the judge to whom the application for injunction was originally presented for further proceedings.[1]

From the foregoing action of the Court below, the Appellants have brought this appeal.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered on the 1st day of November, 1971, is reported at 335 F.Supp. 804. The District Court's dismissal of Ap-

[1] On or about the 8th day of June, 1972, the Court entered its order of dismissal in connection with the challenge to Article 4.02 of the Texas Family Code. Such order of dismissal is found as Appendix "A" of this brief.

pellants' challenge to Article 4.02 of the Texas Family Code is found as Appendix "A" to this brief.

STATUTES INVOLVED

Article 4.02 of the Texas Family Code provides that:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

Article 602 of the Texas Penal Code provides that:

> "Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

QUESTIONS PRESENTED

1. Whether the Appellants have standing to challenge the validity or constitutionality of Article 602 of the Texas Penal Code?
2. Whether the provisions of Article 602 of the Texas Penal Code are in violation of the Constitution of the United States?

ARGUMENT

"Whether the Appellants' have standing to challenge the validity or constitutionality of Article 602 of the Texas Penal Code?"

The Court below held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of Appellants' case.

Article 602 of the Texas Penal Code provides that any "husband" who fails to support his wife, or any "parent" who fails to support his "child" is subject to criminal prosecution and punishment. However, the Texas courts have held that only parents of legitimate children may be criminally prosecuted under Article 602 of the Texas Penal Code. *Beaver v. State,* 256 S.W. 929 (Tex.Crim.App. 1923).

As the Appellant, Linda R. S., is the mother of an illegitimate child, she could not be criminally prosecuted for failure to support her child and is in absolutely no danger of being prosecuted for a violation of Article 602 of the Penal Code. As was noted by the Court below, the proper party to challenge the validity or constitutionality of Article 602 of the Texas Penal Code would be a parent of a legitimate child who was being prosecuted pursuant to Article 602. The challenge in such a case would be on the basis that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

The decision by this Court in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968), contains one of the most comprehensive treatments involving the issue of standing which is now once again before the Court. The following statements from this Court's decision are most revealing in view of the facts here presented:

> "The jurisdiction of the federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this

case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' . . . Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. . . .

"Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. . . .

". . . And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' C. Wright, Federal Courts 34 (1963). Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. . . .

However, the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' United States v. Fruehauf, 365 US 146, 157, 5 L Ed2d 476, 483, 81 S Ct 547 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a

role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

". . .

". . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 US 186, 204, 7 L Ed2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. . . . A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues.' United Public Workers v. Mitchell, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of 'a hypothetical or abstract character,' Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937). . . .

". . . It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' Baker v. Carr, supra, at 204, 7 L Ed2d at 678, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' Aetna Life Insurance Co. v. Haworth, supra, at 240-241, 81 L Ed at 621, 108 ALR 100. . . ."

Since the decision by this Court in *Flast v. Cohen*, there have followed such cases as *Jenkins v. McKeith-*

en, 395 U.S. 411 (1969), *Data Processing Service Organization v. Camp,* 397 U.S. 150 (1970), *Arnold Tours v. Camp,* 400 U.S. 45 (1970), *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), and *Barlow v. Collins,* 397 U.S. 159 (1970). These cases since *Flast v. Cohen* appear to represent no departure from the basic teaching of *Flast v. Cohen* although they do give rise to the so-called "zone of interest" reasoning. However, it would hardly appear that the "zone of interest" concept has cast aside the statements found in *Flast v. Cohen* that ". . . the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. . . .", and that ". . . when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself it justiciable. . . ."

Certainly the issue of whether Article 602 of the Texas Penal Code is in violation of the Constitution of the United States is a justiciable one, but the question here presented is whether Appellants have the necessary standing to raise this issue. In the absence of such standing, for the federal courts to pass on the constitutional question would be a radical departure from this Court's long-standing rule and position against the giving of advisory opinions.

In the present case, the Appellants are challenging the constitutional validity of a penal provision, which has been declared by State court decision to be inapplicable to Appellants and the class they represent, and even should this Court declare the penal provision invalid it would have no effect on Appellants or their class, or fathers of illegitimate children but would merely prevent criminal prosecution of parents of

legitimate children pursuant to its provisions. Apparently the logic of Appellants' position is that if the fathers of illegitimate children cannot be prosecuted pursuant to Article 602 of the Texas Penal Code, then the fathers of legitimate children should also be denied this peril. While this is indeed a strange position to be taken by those concerned with the interests of children, it is apparently based on the concept that if possibly the courts will invalidate this penal provision in its present form it may ultimately result in the Legislature of the State of Texas broadening the scope and operation of Article 602 of the Penal Code. The fallacy of Appellants' position is most aptly set forth by the comments of the District Court below in its later order dismissing Appellants' challenge to Article 4.02 of the Family Code:

> "If the statute is declared unconstitutional the result is there would be no civil statutory requirement for the support of children—legitimate or illegitimate. It is clearly in the interest of the State for children to be supported and in this writer's opinion there is no rational basis for a distinction between legitimate and illegitimate children. But 'invalidating legislation is serious business. . . .' *Morey v. Doud,* 354 U.S. 457, 474 (1957). To hold that the Equal Protection clause should apply would invalidate a statutory provision of critical importance to Texas' carefully drawn Family Code. I am unwilling to construe the Equal Protection clause in such a way as to bring about the result of having no requirement in Texas law for the support of children. Such action would indeed be a backward step in the State's concept of the duties and obligations of parents and in the social program of the State.
>
> "On the other hand, to declare that the statute should be interpreted to require fathers to support illegitimate children is equally untenable. The fact that a State has failed to provide a rem-

edy for a wrong does not thereby vest the federal courts with the authority to legislate by judicial fiat what a state legislative body has either refused or failed to enact. As declared in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the federal courts 'do not sit as a super-legislature to determine the wisdom, need and propriety of law that touch . . . social conditions.' While in the opinion of this writer, fathers of illegitimate children should be required to support their children this is a matter to be remedied by the Texas Legislature and not by the Court."

While the foregoing dealt with the civil statutory provisions challenged by the Appellants, the logic and reasoning are equally applicable to Appellants' challenge to the penal provisions here involved—Article 602 of the Texas Penal Code.

The Appellants no doubt have interest concerning the provisions of Article 602 of the Texas Penal Code because they would like to see it extended so that fathers of illegitimate children could be prosecuted for failure to support their children, but this interest is one properly directed to legislative halls and not the Courts. Certainly, Appellants' "zone of interest" in this matter could hardly be said to extend to the point of freeing from possible criminal prosecution the fathers of legitimate children.

The Court below reached the conclusion that the Appellants did not have the necessary standing to raise a challenge to Article 602 of the Texas Penal Code. Appellees submit that this was the proper result. If the provisions of this penal act are to be challenged by someone, then let it be by one who stands to suffer penalties from its enforcement—not someone who merely seeks to have it broadened to extend to others.

"Whether the provisions of Article 602 of the Texas Penal Code are in violation of the Constitution of the United States?"

The challenge of the Appellants in the Court below was a two-fold one. In one thrust, the Appellants questioned the validity of a penal provision, and in the other they questioned the validity of civil statutory provision. As to the criminal provision, Article 602 of the Texas Penal Code, the Court below held that the Appellants did not have the necessary standing to challenge this provision and dismissed this portion of Appellants' suit. As to the civil provision, Article 4.02 of the Texas Family Code, the Court below recognized that such a challenge was improper for consideration by a three-judge federal court as there was no state officials or officers involved in the operation of Article 4.02. As noted by the Court below, Article 4.02 of the Texas Family Code is enforced through a civil suit for damages against a defaulting spouse. This portion of Appellants' suit was remanded to the District Court for consideration by a one-judge court. The order of dismissal ultimately entered in this portion of the proceeding is found as Appendix "A" to this brief, and to this date the Appellees are unaware of any Notice of Appeal being made as to this decision in that portion of their case.

While the Appellants have used the vehicle of their challenge to Article 602 of the Texas Penal Code to bring their case before this Court, their entire argument seems to be based on the reasoning used in the challenge to Article 4.02 of the Texas Family Code which deals with obtaining a form of child support—not with the criminal prosecution of parents under the provisions of Article 602 of the Texas Penal Code. Consequently, it becomes difficult to come to grips with just what issues the Appellant wishes to litigate

at this point. Appellees would suggest that the Appellants are in actuality attempting to get the Court to pass primarily upon the provisions of Article 4.02 of the Texas Family Code and have seized upon the indirect way of accomplishing this by their pursuit of the challenge to a penal provision somewhat related in nature. This would seem especially true in light of the fact that Appellants have spent the majority of their argument contending that the challenged provisions are unconstitutional, but in their prayer for relief have asked:

> ". . . that a permanent mandatory injunction issue, requiring the Dallas County District Attorney, and the State of Texas to cease discriminatorily excluding children of unwed parents from the benefits of its child support laws, and specifically from excluding children of unwed parents from the benefits of Article 602 of the Texas Penal Code."

In this same connection, it becomes increasingly difficult to follow the logic or reasoning of just what Appellants are seeking. Their urgent pleas for a determination that the challenged statutes are unconstitutional is immediately followed by their request that the Court not only breathe life back into these statutes but enlarge upon their scope of operation. Perhaps the Appellants merely seek to have the courts judicially legislate what the Legislature of the State of Texas has to date failed or refused to enact.

While not wishing to debate the sociological and economic arguments advanced by Appellants to justify requiring the natural father of an illegitimate child to assume the burden of support of such child, Appellees are of the opinion that in this case such a decision is one which must be determined in legislative halls rather than by judicial fiat. Consequently, the decision

rendered by the court below should be affirmed. Such a decision would neither offend nor conflict with this Court's previous decisions in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed2d 436 (1968); *Glona v. American Guaranty and Liability Ins. Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); or *Weber v. Aetna Casualty & Surety Co.*, 40 L.W. 4460 (April 24, 1972).

In Texas, the natural father of an illegitimate child is under neither a common law nor statutory duty to support his illegitimate children. *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1966); *Lane v. Phillips*, 69 Tex. 240 (Tex. 1887); *Beaver v. State*, 96 Tex. Crim. 179, 256 S.W. 929 (1923). Whether this long recognized principle in the jurisprudence of the State of Texas is to join the rapidly swelling ranks of those statutes and legal decisions of Texas and other states invalidated by the ever growing and proliferating demands of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, necessitates an examination of those cases in this area commencing with *Levy*.

Levy was an action on behalf of minor illegitimate children for the wrongful death of their mother. The children had sued to recover under a Louisiana statute, and the Louisiana courts had held that "child" in the wrongful death statute meant "legitimate child." The appeal to the United States Supreme Court was based upon the contention that such a result constituted a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. *Glona* was a companion case involving the same facts with the exception that it was an action to recover by the mother for the wrongful death of an illegitimate child. Footnotes in

the case of *Levy v. Louisiana* reveal that under Louisiana law both parents are under a duty to support their illegitimate children.

The court in *Levy v. Louisiana* stated that:

> "The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is an issue, why, in the terms of 'equal protection,' should the tort feasors go free merely because a child is illegitimate? . . .
>
> ". . .
>
> "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

In *Glona* this Court applied the same reasoning as in *Levy,* but of interest is this Court's statement, or possible warning, in its opinion that:

> "Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. *Where the claimant is plainly the mother,* the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." (Emphasis added.)

The foregoing statement is significant in the present case because Appellants would have this Court venture into that new area where parenthood is not so readily proved or disproved.

Whether the decision in *Levy* and *Glona* would be extended beyond the relationship between the mother and the illegitimate child so as to include relationships involving the father was most interestingly commented upon by the court in the case of *Jerry Vogel Music Co.*

v. Edward B. Marks Music Corp., 425 F.2d 834 (2nd Cir. 1969), where in the opinion it was held that:

"Plaintiff pretermits what an enthusiast over *Levy* characterizes as 'the interesting question . . . whether it will be extended to the father-child relationship,' with what is considered the pleasant result of invalidating 'hundreds of state statutes and several federal laws' [footnote — Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity, 36 U. Chic. L. Rev. 338, 339 (1969)] — not to speak of the common law rule in force when the Fourteenth Amendment was adopted. The highest courts of Ohio and Missouri have reached differing results concerning the illegitimate child's right to paternal support, Boston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968); R—— v. R——, 431 S.W.2d 152 (Mo. 1968); cf. Munn v. Munn, 450 P.2d 68 (Colo. 1969). In Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), the Supreme Court of New Jersey refused, in the light of Levy to follow a direction in the state's wrongful death statute keying recovery to those entitled to take by intestacy when that course would have ruled out illegitimate children of a father. The effect of *Levy* and *Glona* in cases of actual intestacy of the father, which *De Sylva* held to be the closest parallel to the forced succession of the Copyright Act, seems not yet to have been directly decided by the highest court of any state. But see In re Estate of Jensen, 162 N.W.2d 861, 877-879 (N.J. 1968); Succession of Bush, 222 So.2d 642 (La. Ct. App. 1969); Strahan v. Strahan, 304 F.Supp. 40 (W.D. La. Sept. 22, 1969).

"We find it unnecessary to attempt to forecast whether the Supreme Court will differentiate between the situations of the father and of the mother [footnote — We do suggest, however, that the differences in the problem of proof are not to be minimized. As any lawyer with experience in defending against claims of relationship advanced

long after the critical date would vividly realize, it is altogether too simplistic to say 'Recovery should be denied in the absence of proof, but granted in the presence of proof.' See Krause, supra, 36, U. Chic. L. Rev. at 344]."

Before discussing *Labine* and *Weber,* it would seem that this Court has already indicated its reluctance to extend the decision in *Levy* and *Glona* beyond the facts presented in such cases. *Levy* and *Glona* were decided on May 20, 1968, and less than a month later, on June 17, 1968, this Court rendered its decision in the case of *King v. Smith,* 392 U.S. 309 (1968). This case dealt with whether the "substitute father rule" of the State of Alabama, in connection with its operation of the AFDC Program (Aid to Families With Dependent Children) was in conflict with the provisions of the Social Security Act and the Constitution of the United States. The court in its decision based its decision upon the Social Security Act rather than constitutional grounds in deciding that the Alabama rule was invalid. However, it is interesting to note in the concurring opinion in *King* an attempt was made to base the decision upon the reasoning of the court in *Levy,* but apparently the majority of the court did not desire to so extend the doctrine of *Levy.* This becomes even more important when one considers and studies the facts actually before the court in *King.* In Alabama, only legitimate children are entitled to support from their parents. If the doctrine of *Levy* was intended by this Court to be extended to the relationship between an illegitimate child and its natural father, then the result reached in *King* would have been decidedly different. The court in its decision in *King* stated that:

". . . Whether the substitute father is actually the father of the child is irrelevant. It is also irrelevant whether he is legally obligated to support

the child, and whether he does in fact contribute to their support. . . .

". . . In other words, the state argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father is in the home, *it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly.* The difficulty with this argument is that it fails to take account of the circumstances that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their father; *the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term 'parent' in §§406a of the Act, 42 U.S.C. §§606(a), to include only those persons with a legal duty of support.*

". . .

"The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child.

". . .

". . . On the question of whether the man must be legally obligated to provide support before he can be regarded as a child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a State-imposed legal duty of support.

". . .

". . . We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under

no legal duty to support a child would in any way provide meaningful economic security for that child." (Emphasis added.)

Had this Court, in its decision in *King*, felt that the decision in *Levy* gave the right to an illegitimate child to obtain support from his natural father, it would have been necessary for the court to reach a different decision as to a certain class of AFDC recipients. If the illegitimate child's father is alive and is under an obligation to support such child, by an extension of the decision in *Levy*, then this might well result in the child and the mother being ineligible for AFDC benefits regardless of whether the illegitimate child's father is actually supporting the child. Undoubtedly this Court did not wish to reach this result and consequently must have rejected the view of extending the doctrine of *Levy* suggested by the concurring opinion. Unless such interpretation is given in the later decision in *King*, then the interpretation sought by Petitioners for the extension of *Levy* would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits.

In *Labine* this Court had before it an attack against certain statutes governing intestate succession that barred an illegitimate child from inheriting or sharing in its father's estate. This Court in upholding the validity of such statutory enactments specifically declined to extend the *Levy* and *Glona* rationale into an area to which it felt it did not apply. As Appellees are of the opinion that *Labine* is controlling in the instant case, notice should be taken of the statements found in this Court's opinion which limited further expansion of *Levy* and *Glona:*

". . . The cause of action alleged in Levy was in tort. It was undisputed that Louisiana had cre-

ated a statutory tort . . . so that a large class of persons injured by the tort could recover damages . . . . Under these circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort. . . . Levy did not say and cannot be fairly read to say that a State can never treat an illegitimate child differently from legitimate offspring. . . .

". . .

". . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State.

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father. . . ." (Emphasis added.)

In the present case, as in *Labine,* there is no insurmountable barrier to the illegitimate child obtaining support from its natural father. The father could, as mentioned in *Labine,* legitimate the child by marrying the mother; the father could voluntarily undertake to support the child; and the father could even legally become liable for the care of the illegitimate child if he has assumed these responsibilities. *Franks v. Franks,* 138 S.W. 1110 (Tex. Civ. App. 1911, writ ref.).

As this Court concluded in *Labine,* there is nothing in the vague generalities of the Equal Protection and

Due Process Clauses which would empower this Court to nullify the deliberate choices of the elected representatives of the people of Texas or the judicial determinations of the Texas courts as to the common law rule to be followed within its boundaries.

This now brings us to the recent decisions of this Court in *Weber* where certain limitations upon recovery by illegitimate children under the workmen's compensation laws of Louisiana were under attack. This Court, in holding invalid the provision challenged, felt that *Levy,* rather than *Labine,* was the applicable precedent to follow in the case before it. However, the very language of *Weber* discloses that *Labine,* rather than *Weber* or *Levy,* should be controlling and the applicable precedent in the case now under consideration. This Court stated in its opinion that:

> ". . . in Labine the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position. . . . The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them. . . .
>
> ". . .
>
> " . . . the state interest in minimizing problems of proof is not significantly distrubed by our decision. . . ."

The foregoing statements which weigh most heavily in this Court's decision to apply *Levy* rather than *Labine* would be hardly applicable in the present case. There does not exist the insurmountable or difficult barrier to the illegitimate child receiving support from its natural father. In turn, to follow *Levy* in this case would be to trigger a potential torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and uncertain. This becomes

especially critical when there exists no common law precedent within the jurisprudence of the State of Texas to either determine paternity, or such ancillary issues as support, visitation rights, and the like, and the Legislature has chosen, to date, not to exercise its exclusive right to enact statutory provisions which would offer guidelines.

The foregoing is especially true in view of the language of this Court in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), where it was stated that:

> ". . . A legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, In., 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

The Appellees in the foregoing comments have for the most part been replying to Appellants' assertions dealing with their challenge to Article 4.02 of the Texas Family Code—an issue not actually before this Court, but one which Appellants seem determined to pursue in their brief. Certainly, however, the decisions in *Levy, Glona, Labine* and *Weber* have little application to the challenge to Article 602 of the Texas Penal Code. Appellants would use this line of reasoning to explore an area even more complicated. In this respect, one could only imagine the difficulties to be encountered by a prosecutor if one of the elements necessary for a conviction under Article 602 of the Texas Penal Code, in a case dealing with the father of an illegitimate child, was to prove "beyond a reasonable doubt" that the accused was the actual father.

This difficulty, standing alone, discloses the rationality of the choice made by the Legislature of Texas in its enactment of Article 602 of the Texas Penal Code. Few prosecutors would elect to proceed with such cases when the question of proving the required elements of guilt was so unlikely or uncertain. The same problem is present even though to a lesser extent, as pertains to Article 4.02 of the Texas Family Code.

Such cases as *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153 (1970), set forth that the Fourteenth Amendment gives to the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Perhaps it would be wise to view this position with the warning of the dissent in *Reynolds v. Sims,* 377 U.S. 533 (1964), that not every major social ill in this country can find its cure in some constitutional principle. To attempt to cure all real or imagined inequities by innovative judicial expansion of the Fourteenth Amendment is to deprive the legislative branch of government of its very reason for existence or to create some form of competitive arena in which the separation of power doctrine is ignored and wild races are run to see which branch of government comes up with the best political solution.

CONCLUSION

Appellees submit that the Appellants do not have the proper standing to challenge the provisions of Article 602 of the Texas Penal Code and that the decision of the court below should be affirmed. In the alternative, the Appellees submit that the challenged statutory provisions are valid and constitutional enactments of the State of Texas.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

SAMUEL D. MCDANIEL
Staff Legal Assistant

J. C. DAVIS
Assistant Attorney General

PAT BAILEY
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28 day of July, 1972, I served a copy of the foregoing Motion to Affirm on the Appellants by depositing a copy in the United States mail, postage prepaid, and addressed to the attorney of record for Appellants as follows: Mr. Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas.

PAT BAILEY

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION 3-4336-B

LINDA R. S., suing on behalf of herself and her minor daughter, and on behalf of all other similarly situated

v.

RICHARD D., and THE STATE OF TEXAS

ORDER OF DISMISSAL

Plaintiff, Linda R. S., sues Richard D. on behalf of herself, her minor daughter and all others similarly situated. She alleges that Richard D. is the father of her minor child, that he has refused to marry her or to support their minor daughter. She prays for a Declaratory Judgment that Article 4.02 of the Texas Family Code is unconstitutional in the exclusion from support of children of unwed parents, that the common law of the State of Texas entitles her child to support by Richard D. and that Richard D. be required to pay a reasonable amount for the support of his child.

Richard D. defaulted. The State of Texas was granted leave to intervene. In its intervention the State contended that Plaintiff had failed to state a cause of action upon which relief could be granted. This Court agrees.

The statute involved, Article 4.02 of the Texas Family Code, provides that:

> Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed.

There is no statute requiring fathers to support illegitimate children. For this reason Plaintiff contends she and her child are denied equal protection of the law and she asks this Court to declare Article 4.02 uncontitutional, or in the alternative, to hold that it should be interpreted to require fathers to support illegitimate as well as legitimate children.

If the statute is declared unconstitutional the result is there would be no civil statutory requirement for the support of children—legitimate or illegitimate. It is clearly in the interest of the State for children to be supported and in this writer's opinion there is no rational basis for a distinction between legitimate and illegitimate children. But "invalidating legislation is serious business . . ." *Morey v. Doud,* 354 U.S. 457, 474 (1957). To hold that the Equal Protection clause should apply would invalidate a statutory provision of critical importance to Texas' carefully drawn Family Code. I am unwilling to construe the Equal Protection clause in such a way as to bring about the result of having no requirement in Texas law for the support of children. Such action would indeed be a backward step in the State's concept of the duties and obligations of parents and in the social program of the State.

On the other hand, to declare that the statute should be interpreted to require fathers to support illegitimate children is equally untenable. The mere fact that a State has failed to provide a remedy for a wrong does not thereby vest the federal courts with the authority

to legislate by judicial fiat what a state legislative body has either refused or failed to enact. As declared in *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965), the federal courts "do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch . . . social conditions." While in the opinion of this writer, fathers of illegitimate children should be required to support their children this is a matter to be remedied by the Texas Legislature and not by the Court.

Plaintiff's next contention is that the common law of Texas imposes a duty upon the father of all children to support their offspring.

One of the first statutes[1] passed in Texas adopted the common law of England. Dating back centuries the common law did not require fathers of illegitimate children to support such children. Texas courts have considered the question of support of illegitimate children under the common law and have all held that without a specific statute requiring such support a father was under no duty to do so.

As early as 1887 in *Lane v. Phillips,* 6 S.W. 610, the Supreme Court of Texas declared that the rules of the common law did not impose on a father the duty to support children not born in wedlock.

In the case of *Beaver v. State,* 256 S.W. 929 (Texas Crim. App. 1923), the Court reversed a conviction for the failure of a father to support his illegitimate child and in doing so commented that:

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[1]Art. 1 Texas Revised Civil Statutes. "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

"The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this State, we must perforce hold that the statute in question does not apply in the present instance."

Later Texas cases have likewise declared that under the common law a father had no duty to support his illegitimate children. G——— v. P———, 466 S.W. 2d 41 (Texas Civil Appeals, San Antonio 1971), writ ref. n.r.e., *Curtin v. State,* 238 S.W. 2d 187 (Tex. Cr. App. 1950), *Bjorgo v. Bjorgo,* 391 S.W. 2d 528 (Tex. Civ. App. Amarillo—1965), Home of Holy Infancy v. Kaska, 397 S.W. 208 (Sup. Ct. of Tex. 1965).

The place for determining the common law of a State is within the state courts and not in the federal court. In the face of a ruling by the Supreme Court of Texas that the common law did not provide for the support of illegitimate children, it would indeed be presumptuous for this Court to amend the common law by providing that fathers have a duty to support illegitimate as well as legitimate children. Such an amendment of the common law would again be setting this Court up as a legislative body which role this Court does not intend to assume.

Plaintiff next contends that if the common law is not to be interpreted to provide for support of illegitimate children it is a denial of equal protection of the law and should be declared unconstitutional. As in the case of the statutory law of Texas to declare that the common law denies equal protection of the law and therefore is unconstitutional would in effect be nullifying a law which has been in existence for centuries. There is no authority for such action and without authority this Court will not extend the Equal

Protection clause of the Constitution to invalidate the common law.

In addition to a declaratory judgment interpreting Article 4.02 of the Texas Family Code and the common law in such a way as to provide for Plaintiff's minor child Plaintiff prays that Richard D. be required to pay a reasonable amount for the support of his child.

Plaintiff has failed to advance any theory under the Constitution or laws of the United States or of the State under which this Court could require Richard D. to make child support payments. The awarding of such payments and the conditions under which they are to be awarded have customarily been matters provided for by the legislative bodies of the various states and enforced by the State Courts. Rights to child support payments have not been conferred by the laws or Constitution of the United States. This Court has no jurisdiction to enforce Texas support laws. Their enforcement is wholy confined to the State Courts.

For the reasons stated this Court is of the opinion that the Plaintiff has failed to state a cause of action for which relief can be granted.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is dismissed with prejudice at Plaintiff's cost.

SARAH T. HUGHES
United States District Judge